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IN THE

Supreme Court of the United States

October Term, 1964
No. .....

In re Establishment of NORWALK CALL as a Newspaper of General Circulation.

WHITEHEAD-DONOVAN CORPORATION,

Appellee,

vs.

HERALD PUBLISHING COMPANY,

Appellant.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

Appellee, Whitehead-Donovan Corporation, a California corporation, hereby moves the Court that it dismiss the within appeal from the Judgment rendered by the Supreme Court of the State of California on the grounds that it does not present a substantial federal question.

There is no evidence in the record from the lower courts and now before this Court to support Appellant's averments in its Jurisdictional Statement that any federal question as to an invalid discrimination is a sub-

stantial one. On page 11, last line of its Jurisdictional Statement Appellant states that "By giving a constitutional economic advantage to those newspapers who can qualify under the 1961 amendments, the court has tipped the economic balance in favor of any such newspaper, or the successor in interest of any such newspaper, by allowing the economic aid from the publication of official publications for cities, school districts, courts and such other publications as are required to be published within the city". This is a statement of counsel. No evidence appears in the record to support it. "Tipping the economic balance" denotes that by force of the questioned statute alone appellee newspaper is made economically predominant over appellant. But nothing in the record shows the relative economic positions of appellant and appellee before and after application of the questioned statute. If the evidence does not show such a relative alteration in appellant's economic position by reason of the statute, where lies the discrimination? What advertising did appellant lose by reason of the fact that it is a newspaper of general circulation for the County of Los Angeles instead of for both the County and City of Los Angeles as is the appellee? How much school district, court or other advertising was lost by appellant since the operation of the statute as contrasted with before? Actually many factors much more important than printing public notices of the City of Norwalk may affect the relative competitive positions of appellant and appellee, as for example whether the newspapers are individual community newspapers or components of a newspaper chain with a central printing plant, what the respective advertising rates are, what the respective distributions or circulation may be, whether or not appellant actually suffered any sub-

stantial loss of legal advertising. None of these matters were put into evidence by appellant at any stage of the proceedings. If the appellant desired to show that the legal advertising here involved "tipping the economic scale", appellant should have introduced evidence in the court below at the proper stage of proceedings, thereby giving appellee an opportunity to counter with cross-examination or rebuttal evidence of its own. The burden was at all times on appellant to show the discrimination and its unreasonableness and not on the appellee to show the lack thereof.

Appellant states on page 12 of its Jurisdictional Statement that "It has been noted by many that the economics of the newspaper business have led to the elimination of competition in most cities (citing the Freedom of Press Symposium). Again, it is appellant's duty to relate the question of eliminating competition from "most cities" to the City of Norwalk, California, and from "many newspapers" to the two here in question.

The bare averment of a federal question without an adequate record to support it is not sufficient. (*St. Louis Railway Co. v. Missouri,* 15 S. Ct. 443, 156 U. S. 478, 39 L. Ed. 502.) The record itself should show existence of an actual discrimination, its nature, how it affects appellant, and why it is unfair or unreasonable. Did this claimed discrimination actually place appellant at an unfair advantage vis a vis appellee? If so in what way? How substantially? Is the legislature justified in the distinction it made? But appellant's averments as to discrimination and unfairness remain barren of actual facts to support them.

As opposed to the lack of facts in the record from which the actual unreasonableness or unfairness of any

discrimination may be adduced is the valid reason which has always existed for permanency and stability in order that a newspaper may be sufficiently established to provide a reliable medium for publication of official notices which can sometimes affect individual legal rights. Appellant has indicated this on page 13 of its Jurisdictional Statement where it cites *The Application of the Monrovia Evening Post,* 199 Cal. 263. The requirement of a printing press under the adjudication statutes is one of those factors encouraging the maintenance of a fixed abode and the stability deemed desirable for a newspaper if it is to publish official notices. The only exception to the statutory requirements in Sections 6000 and the following sections of the Government Code cited by Appellant in its Jurisdictional Statement is the one here called into question (Section 6006 of the Government Code of the State of California) exempting those newspapers from the printing requirement where their historical establishment over a long period of years, such as the 75-year old Norwalk Call, gives them a stability and permanence of residence which in the apparent belief of the California legislature can excuse them from the particular printing requirement. In a state growing as rapidly as California the legislature might well feel that stricter requirements will be necessary for adjudication of newspapers in future years. It is not unusual in our increasingly complex society for governmental authority to create more stringent regulations governing the exercise of businesses and professions, nor is it unusual to exempt already established businesses and professions from the new stricter requirements, whether in the field of zoning, or in the practice of professions or the engaging

in various forms of business enterprise. Not all discriminations made by governmental authority are invalid. Where there is patent unfairness or unreasonableness the constitutional prohibition may apply. But the legislature's discretion in this field is not invaded lightly. And certainly not without evidentiary support in the record.

Respectfully submitted,

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